No. 14521

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PANTHER OIL & GREASE MANUFACTURING COMPANY, a corporation, *Appellant,* vs. JOHN NORMAN SEGERSTROM, as Administrator of the Estate of H. N. Segerstrom, *Appellee.*	NO. 14521

Appellant's Brief

On Appeal from the District Court of the United States, for the Eastern District of Washington

R. E. LOWE
PAINE, LOWE, COFFIN, ENNIS & HERMAN
BEN H. KIZER
GRAVES, KIZER & GRAVES
All of Spokane, Wash.
Attorneys for Appellant

C. W. HILL PRINTING CO.

AUTHORITIES CITED

CASES

TEXTS

STATUTES

JURISDICTION

The action was commenced in the Superior Court of Spokane County, Washington, on the 5th day of October 1953 by service of summons and complaint. (R. 3). On October 23, 1953, the defendant filed its Petition for Removal to the United States District Court for the Eastern District of Washington. (R. 3).

The plaintiff is and was a citizen and resident of Spokane County, Washington in the Eastern District, and the defendant is and was a corporate citizen of the State of Texas. (R. 4-5). This action was a civil action to recover damages for breach of express or implied warranty, for $361,000.00. (R. 4). Petition and Bond were duly filed and notice served. (R. 6).

The case was tried to a jury with a verdict for $111,035.00. (R. 34) and judgment entered thereon May 10, 1954. (R. 35).

On May 17, 1954 Motion for Judgment Notwithstanding Verdict, or for Partial New Trial was served and filed. (R. 36. The motions were denied June 14, 1954. (R. 40-41). On June 23, 1954 the defendant gave Notice of Appeal (R. 42) and duly filed a Cost and Supersedeas Bond. (R. 42-44).

On June 26, 1954 the time for filing the record in this court was extended to and including September 21, 1954. (R. 44-45).

The jurisdiction of the District Court is based upon Title 28, §§ 1441-1449 USCA.

The jurisdiction of this court is based upon Title 28 USCA, § 225, (§ 128 of Judicial Code) as amended.

ABSTRACT OF FACTS

PLEADINGS

The case was tried upon an Amended Complaint (R. 7-12) and Amended Answer to Amended Complaint. (R. 13-17). The plaintiff alleged that he purchased from defendant, through its agent, roofing materials, called "Battleship roof coating" and "Battleship roof primer" (R. 7-8). That the estate of which plaintiff was administrator owned a large concrete cold storage warehouse building and two adjacent frame warehouses, together with stock and equipment. (R. 8).

That on July 8, while plaintiff's employees were applying Battleship roof primer and were using due care, the roof primer violently exploded and ignited, setting fire to the buildings, and substantially destroyed the buildings and contents. (R. 9).

He alleged the explosion and fire were proximately caused by negligence and carelessness of the defendant, in that the Battleship roof primer was highly inflammable and explosive; that the defendant knew or should have known that fact and wholly failed, by labeling the containers or otherwise, to warn plaintiff and plaintiff's employees. (R. 9-10).

(At the pre-trial conference plaintiff withdrew all allegations and claims as to breach of warranty, express

or implied, and announced that he relied solely on claims of negligence.) (R. 21).

By its Amended Answer, defendant admitted the sale by its agent and denied the allegations as to representations or warranties by the agent. (R. 13). Defendant admitted that the plaintiff ordered Battleship roof coating and Battleship roof primer, admitted the sale, and denied all of the allegations of negligence. (R. 14-15).

Affirmatively, the defendant alleged:

First: Contributory negligence by the plaintiff and his agents. (R. 15).

Second: That plaintiff was furnished an instruction pamphlet but failed to follow the same or communicate the same to his employees. (R. 16).

Third: That the defendant's employees placed the Battleship primer in open containers, over an open fire, knowing that it was dangerous and there was danger of fire. (R. 16).

Fourth: That the merchandise was sold pursuant to a written order signed by the plaintiff and accepted by the defendant, which provided, in substance, that there were no conditions or agreements not shown in the original copy, and no statement or agreement should vary any part of the written agreement or be binding upon the company or buyer; that the buyers agree that the company has made no representations or warran-

ties express or implied not shown in the order. (R. 16-17).

A pre-trial order was entered (R. 17-22), as a part of which it was stipulated so far as material:

II. That Battleship primer is made according to specifications; that it is a uniform product as shipped by the defendant, and all barrels of Battleship received by the plaintiff were uniform as to contents when shipped. (R. 19).

The contentions of the parties were stated to be—

On behalf of the plaintiff, in substance:

I.

That the defendant knew or should have known that the Battleship primer was inherently dangerous and did not warn plaintiff in some way of its dangerous nature. (R. 20), and

II.

That the product could not be applied without heating, which the defendant knew or should have known, and the defendant knew or should have known that heating would render the material dangerous and subject to explosion or ignition of volatile gases while being heated. (R. 20-21), and

III.

That the sale of the product was in violation of the

Revised Code of Washington § 70.74.300, because the containers were not labeled "explosive" (R. 21).

IV.

The plaintiff withdrew all allegations, claims or contentions as to breach of warranty, express or implied, and relied solely upon negligence. (R. 21).

As a part of the pre-trial order, the defendant made the following contentions:

I.

That Battleship primer was not inherently dangerous and defendant neither knew or could have known it was such. It is not an explosive. (R. 21).

II.

Plaintiff signed an order blank which barred him from any reliance upon representations other than those contained in the order blank and instruction pamphlet. (Ex. 14) (R. 21), and

III.

Defendant gave plaintiff written instructions as to use and no fire would have occurred if they had been followed. (R. 21-22), and

IV.

The employees of the plaintiff exposed the primer to an open fire inside of a building, realizing that such action was dangerous, and the plaintiff assumed the risk. (R. 22).

EVIDENCE

There is no question on the amount of damages. All of that evidence is omitted from the record. The trial commenced on Monday, April 26th and continued through Saturday, May 8th.

The defendant manufactures, among other things, roofing materials which are sold under the general designation of Battleship products. (Ex. 14), and one of these products is roofing primer. (R. 59, Ex. 14), which is used on old roofs to furnish waterproofing. (R. 198-199). These products are made from asphalt, a petroleum residue (R. 272, 275) and the primer, sold by defendant in this case, was manufactured to its specifications by the Standard Oil Company of Indiana, at Casper, Wyoming, and is known as a cut back asphalt and for a cold application process. (R. 190, 191, 194, 199, 204, 238, 239, 269-273).

The Standard Oil Company distills crude oil and under a controlled heat process, remanufactures the lighter naphthas, which are pumped off to a storage area, and step by step, heavier kerosenes, lubricating oils and fuel oil until there is left in the last still, asphalt, a heavy viscous residue. (R. 238, 239, 243, 246, 270).

The particular product, that is, Battleship primer, is compounded as follows: (Known in the distillery as C K 87 R. 246).

The asphalt at a temperature of about 400 degrees is pumped into a blowing tank and air blown through it

at a pressure of 100 pounds (R. 240) and at a temperature of some 490 to 495 degrees fahrenheit. This changes the properties of the asphalt and this type is used only for cold roofing. (R. 240). It is then pumped into a mixing tank in which there has been placed a stated amount of heavier naphtha as a diluent. (F. 240, 241, 242). After a certain amount of mixing, samples are taken for testing and such a test requires about a day in the laboratory. If the sample is found to be up to specifications, materials are added, if that can be done, but if certain standards are found wanting, the whole tank full goes to the "slop tank" and is there worked over. (R. 242, 243). If any foreign substance is found in it the whole batch is slopped (R. 243). If the test meets specifications, the material is pumped directly into a transport truck and hauled to Denver. As each truck is loaded from the big mixing tank, a sample is taken and tests made. A copy of these tests with a bill of lading is sent by the driver, which are delivered to the Motor Royal Oil Company at Denver, which does the packaging of this product for the defendant. (R. 246, 266). The Motor Royal Oil Company at Denver uses no gasoline in its operations except a 55 gallon drum, kept on hand for motor fuel, and is kept under lock and key. (R. 272). Gasoline is never used as a diluent at the refinery, first, because it is not satisfactory, and, second, it is the most expensive product in a refinery. (R. 244, 246), in fact gasoline is a compound and as such is not produced directly in the refining process. (R. 243).

There is no physical or other connection between the

gasoline storage area and the asphalt plant at the refinery, and they are some two hundred yards apart. It is physically impossible for gasoline such as found in plaintiff's product to get into the roofing asphalt. (R. 243), and it would immediately show up in the test of the load. (R. 240-243).

This material is shipped from the refinery at a temperature of about 209 degrees and it loses 10 to 20 degrees in transportation. At the packaging plant it is pumped directly into another vat (R. 272), where it is heated and then placed, without any further treatment or change, in various casks, barrels and cans (R. 269) while at a temperature of about 219 degrees (R. 272). The particular order was contained in various carload shipments from the Denver plant to the Riverside warehouse (a public warehouse in Spokane). (R. 190, 192, 193, 194, 273, Ex. 50, 51, 52, 53, 54 and 56), and was delivered by auto freight carrier to the defendant. (R. 191, 204, 269 and 273). If any packages are damaged in transit between Denver and Spokane, the warehouse company returns them to the railroad and they are not put in stock. (R. 192).

One of the tests of the hazards of the use of a material is the flashpoint. This is determined by an apparatus and must be made exactly. (R. 258).

It is the temperature of the material itself when the fumes from the material will catch fire at a point one-eighth of an inch from the surface of the material when protected from draft by a protective hood. (R. 200-201). A small amount of material contained in an open

cup is heated in a hot water bath. (R. 201, 275, 276); a flame is moved mechanically exactly one-eighth of an inch above the surface of the material in one second of time and the temperature reached by the material when the flame ignites the rising fumes, is the flash-point. This is known as the tagliabue cup test, for convenience, tag cup, and specifications for the test are very rigid. (R. 114, 115, 200, 201, 275, 276, 258, 268). The room temperature has nothing to do with the test. This primer has a flash point of 80 or above.

The primer, in question, when used out of doors would not flash or catch fire unless an open flame were held an eighth of an inch above the surface in still atmosphere at the time it is being spread. (R. 200, 201, 224, 225).

Plaintiff's order was delivered to him by Riverside Warehouse Company to his plant, fifteen miles east of Spokane, about March first. (R. 67, Ex. 56); the foreman placed it in the cold storage warehouse, (R. 67) which is normally kept at a temperature of about freezing and under refrigeration. (R. 67), and is insulated with eight inches of insulation, walls, ceilings and doors. The refrigeration was turned off about that time but the room was kept closed. (R. 76).

There was mailed to plaintiff by the defendant an instructian pamphlet. (R. 58, Ex. 14), which he admitted receiving. (R. 58, 59). He observed it said: "Instructions for applying Battleship Asbestos Roof Coating" (R. 59).

(Pages two and three of this exhibit are reproduced as an appendix to this brief).

Mr. Rosenbaum, the foreman, examined the barrels of primer, knowing it was to be applied first, and found it quite thick. (R. 76). The next day he sat it out on the loading platform in the sun, where it could warm up. (R. 68). He also called plaintiff Segerstrom and asked if he had any instructions, that it was awfully thick. (R. 68), or asked for directions, according to Segerstrom. (R. 61). Mr. Rosenbaum told him there were no instructions. (R. 61, 77).

On Wednesday morning, Mr. Rosenbaum's crew attempted to draw the material out through the spigot and spread it, but it would not spread, although it ran much better than the day before. (R. 68, 69, 88).

The foreman and his men then made a crude stove from a 55 gallon drum. When completed it lay on its side inside of the building propped with bricks; it had a hole in each end (top and bottom of the drum), one to feed fuel, the other to let out smoke and draft. On the top there was an opening about 24 inches by 12 inches on which angle irons were laid. A fire was built in this stove of apple wood and after the fire had burned down to coals, two five gallon pails of the material were set on the angle irons over the fire to heat. (R. 70, 71, 72, 78, 88, 89).

An employee, Tom Woods, tested the material by sticking his finger into it and when he thought sufficiently thin and warm, carried it up to the roof where

the workmen applied it. (R. 89) and this procedure continued through the forenoon. (R. 89, 90).

During the noon hour someone built up the fire with applewood (R. 71, 93-94). Just after the noon hour, when the first pail had been taken to the roof, there was a sudden "whoosh" and the whole room seemed to catch fire. (R. 91). The entire building and contents was destroyed.

Tests of a similar fire of apple wood built in such a drum, indicates it would reach a temperature of 950 degrees in 20 minutes (R. 182, Ex. 49, 50), and after burning down to coals the temperature varied.

At the end of 135 minutes, the temperature of the front bucket was 295 degrees and the rear 285 degrees.

Mr. Erickson then added more applewood, as was done during the noon hour. In 10 minutes, he had a temperature of 480 degrees, 580 degrees, respectively. In 20 minutes, he had a temperature of 600 degrees and 750 degrees, respectively. The graphs on Exhibits 49 and 50, being Tests "A" and "B", respectively, show the extreme temperatures and the length they lasted. (R. 180, 181; Ex. 49, 50).

A viscous material, such as asphalt, does not circulate as water does when heated. The bottom becomes overheated, while the top remains comparatively cool. (R. 210-211). Even axle grease can be dangerous when so heated. (R. 223).

Rosenbaum, the foreman, and Woods, the workman who was handling the product, both knew the danger. Rosenbaum knew it was dangerous to put this material over a hot fire and he detected a petrolehm odor when it was opened. (R. 79-80); he knew petroleum was inflammable and dangerous to have around a fire. If he had been given an instruction book, he would not have heated the product. (R. 80-81). He told Woods to be careful "I presumed it might burn if it were spilled directly over the fire, (R. 72). Woods knew it might catch fire if it got too hot. (R. 94), and Rosenbaum told him to not let it get too hot. (R. 94).

After lunch the coals were hotter than they were before. (R. 93).

The defendant sold approximately 5½ million gallons of this primer. (R. 262, 263). No complaint of any fire or explosian had ever come to it. (R. 264, 265).

Mr. Urmacher, the Chief Chemist, with twenty-five years experience in the manufacture of petroleum products and roofing, had never heard of an explosion such as this. The product is intended for cold application on the outside of a building roof. (R. 199).

The barrel of primer remained on the loading dock outside of the warehouse after the fire. (R. 81), and about five days after the fire, at the instruction of plaintiff's attorneys, this cask was placed under a machine shed at Rosenbaum's house. (R. 75, 81, 82). Several people were there looking at it at different times, including insurance agents, but otherwise unidentified.

(R. 165). A sample was first taken from this barrel in November, 1953, by the plaintiff's chemist, Kniseley (R. 135) and samples were taken later by Mr. McGivern the following March. (R. 120). These samples were furnished to chemists for the defense. (R. 203). There is no material difference in their findings; they all agreed at that time the product contained about 7 or 8 per cent of gasoline. (R. 124, 137, 218).

It is stipulated that the primer was a uniform product when shipped by the defendant. (R. 19). The hazard of the material was in the gasoline content. (Kniseley R. 138). A material containing gasoline is as dangerous as gasoline. (McGivern R. 138). This sample is more dangerous than straight naphtha. (R. 142).

The chemical characteristic was plotted on a red curve on Ex. 27. This gasoline could not have gotten into the product at the refinery. (R. 246-247). The diluent used in compounding shows a different graph. (R. 247). Something had occurred after the product left the plant. (R. 232). Mr. Urmacher did not question Kniseley's results. (R. 229). Had the gasoline been in the product at any time before leaving the Motor Royal plant, it would have been detected (R. 228) and it would have been impossible to be mixed in the trucks or at the packaging plant. (R. 273).

The whole story of the hazard in these samples was the gasoline in it. (McGivern R. 124, Kniseley R. 141). Gasoline has a greater boosting power than dynamite. (R. 141).

SPECIFICATIONS OF ERROR

I.

The court erred in denying plaintiff's Motion for Dismissal and for directed verdict at the close of plaintiff's case. (R. 166-167).

II.

The court erred in denying defendant's Motion for directed verdict at the close af all the evidence. (R. 289-292).

III.

The court erred in instructing the jury:

> "You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:
>
> 'A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word "Explosive," shall be guilty af a misdemeanor.' "
>
> "You are instructed that a violation of the foregoing statute would constitute negligence."
>
> "If you should find from a preponderance of the evidence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you

that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute."

Exception was duly taken to this instruction (R. 316), the reason being given that it applies only to the items mentioned when they are in an unadulterated condition. Further, that the statute is no longer in effect, and, further, that the substance in question is not within the statutory definition of explosives contained in the statute. (R. 317); and that the statute would not properly apply to the sale of a roofing primer intended for application to an exterior surface of the building.

IV.

The court erred in denying the defendant's Motion for Judgment Notwithstanding the Verdict. (R. 36-41).

V.

The court erred in denying the defendant's alternative motion for a partial new trial on the issue of liability only. (R. 36, 41).

SYNOPSIS OF ARGUMENT

I.

There is no negligence on the part of the defendant, because it could not be reasonably anticipated that this roofing, intended for cold outside application, would ever be placed over a fire within a building, thereby generating explosive fumes. In many years' experience in the production and marketing of millions of gallons of primer such a thing had never happened.

II.

The proximate cause of the accident was the plaintiff's own independent negligence. First, in failing to furnish his employees the instruction pamphlet when the foreman requested instructions. Second, in the employees, not having been furnished instructions, placing the roofing primer over an open fire when they knew that was an hazardous act and they must be careful.

III.

That the lower court committed error in giving to the jury an instruction on the Washington statute requiring certain articles to be labeled "explosive," because, first, he should have construed the statute for the benefit of the jury, second, the statute on its face does not apply to such an article of roofing primer or other products having a thinner or vehicle subject to vaporization, and third, on its face applies to certain products in their original state, rather than a container holding a product with only a small percentage of the named article.

DEFENDANT'S NEGLIGENCE

SPECIFICATIONS OF ERROR I, II, IV.

The plaintiff's theory was, as we understand it and it was submitted to the jury, that the roofing primer was inherently dangerous since it would explode or its vapors would ignite when released under certain cir-

cumstances, namely, when the vapors congregate, as they did in this room, and a flame or spark were present.

Under all the evidence, roofing primer is designed to be used for a certain purpose. Millions of gallons have been used for that purpose and in a proper way without harm or disaster to the user. It is designed to be applied upon the exterior roofs of buildings to waterproof the felt.

There is no actionable negligence when the plaintiff, ignoring warnings and in disregard of the rules of common sense, makes an unexpected and improper use of a material. The basic rule is stated as follows:

> "The idea of risk necessarily involves a recognizable danger, based upon some knowledge of the existing facts, and some reasonable belief that harm may follow. A risk is a danger which is apparent, or should be apparent to one in the position of the actor. The culpability of the actor's conduct must be judged in the light of the possibility apparent to him at the time and not by looking backward 'with the wisdom born of the event'. The standard must be one of conduct, rather than of consequences. It is not enough that everyone can see now that the risk was great, if it was not apparent when the conduct occurred. The court must put itself in the actor's place."
>
> *Prosser on Torts,* Page 220.

(We bear in mind in the instant case that the plaintiff abandoned all claims of breach of warranty, express or implied, and relied solely upon negligence.)

The plaintiff purchased a disinfectant. While pouring from the bottle into a can, some splashed in her

eye, and she was badly injured. The label said in part, " . . . made according to formula of the U. S. Government Hygienic Laboratory"; that, as a disinfectant, "it is safe and non-irritating and of pleasing odor . . ." Later on, the user was told to dilute it one gallon of pine oil to 60 gallons of water, to stir well after adding water. She testified that she had purchased it relying upon the statement that it was safe and non-irritating. The very fact that it was three times stronger than carbolic acid, as stated on the label, required that the safe and non-irritating statement be given this meaning—that it could not be construed to mean that if the undiluted disinfectant accidentally splashed into her eye, it would cause no irritation or harm to the eye. It was manufactured for and purchased by the plaintiff for the purpose of disinfecting her dog kennel. The manufacturer was held not liable as a matter of law.

Bender v. Wm. Cooper,
(Ill.) 55 N. E. 2d 94.

The defendant landlord furnished a restaurant owner rat poison. This was a phosphorous paste contained in tin cans. An employee of the restaurant owner, while attempting to light a gas burner, apparently held the match unintentionally close to one of the cans. An explosion occurred and she was injured. There was no warning on the can stating that it was explosive. The label read in part, "This phosphorous paste is guaranteed to rid any premises of rats or mice." As a matter of fact, it was explosive only under unusual circumstances, and there was, therefore, no duty upon the defendant to impart any notice or warning of danger

to the plaintiff. "Notice or warning of danger is not necessary where no danger is reasonably to be anticipated."

Larrimore v. Am. Natl. Ins. Co.,
(Okla.) 89 Pac. 2, 340 (345).

A manufacturer of fireworks was sued for the death of a youngster who placed a "spit-devil" in his mouth. The package contained no warning that the article was poisonous, notwithstanding the statute requiring such a label. As a matter of fact, the "spit-devil" contained phosphorous. It was shown that most fireworks of that character contain more or less phosphorous. They were intended to be lighted in connection with celebrations.

The court remarked that most fireworks are wrapped in red paper, but that should not make them attractive to eat. The court held that the manufacturer was not bound to foresee that some child might eat the article and therefore could not be held liable for such action on the part of the child.

Victory Sparkler and Specialty Co. v. Price,
(Miss.) 111 So. 437.

Where defendant sold Oil of Mirbane, he placed thereon a label stating the contents. It is a deadly poison but no poison warning was placed on it. Later the purchaser mistook the bottle for mouth gargle; and, in using it as a mouth gargle, he swallowed some and died. It was held there was no liability. The case is decided as partly on proximate cause. But the court said:

"We think, under the facts pleaded, that neither the death of Levin nor a serious injury to any per-

son could be reasonably apprehended or anticipated by the sale af a poisonous substance, labeled by its proper name, to one having full knowledge of its dangerous character."

Levin v. Muser,
(Neb.) 194 N. W. 672. (673).

It is a basic rule of reason that one is not liable for the result which he could not reasonably anticipate. Conditions can be imagined where a simple act results in injury to another where the injured does the unusual and unexpected. For instance, the City of Bellingham, Washington, was excavating for a sewer. In the middle of the afternoon, the crew quit work and placed lghted flare-pots, containing kerosene, to warn street users of the excavation. Some children climbed into the excavation, and one of them pulled a flare-pot over for the purpose of melting same tar. Kerosene poured from the pot onto the boy's clothing, and he was burned to death. An action for wrongful death was dismissed. While the case was decided upon negligence of the child itself and holding that the flame-pot was not an attractive nuisance, language used is in point:

"But whether the flame-pot was accident-proof or not is apart from the issue. No harm could have come to the deceased if he had not himself intermeddled with it."

Clark v. Bremerton,
1 Wash. (2d) 689 (695) 97 P. (2d) 112.

So, in this case, had the defendant applied the cold roofing according to the instruction book and not intermeddled by attempting to heat it, as he was told not to do, no harm would have come to him.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS PLAINTIFF'S OWN INDEPENDENT NEGLIGENCE.

SPECIFICATIONS OF ERROR *I, II, IV.*

We must turn to an appraisal of what is the gist of plaintiff's case. This brings us squarely to a search for the proximate cause of the fire that destroyed plaintiff's warehouse.

Plaintiff's own case shows without dispute the successive steps that created this fire.

1. Plaintiff stored this primer for more than three months (from April 1 to July 8, 1953) in an insulated cold storage room, whereby the primer lost its normal fluidity (R. 68, 76, 77).

2. Plaintiff failed to inquire of defendant to ascertain how this fluidity could be restored or to read the "Battleship" circular given it which warned against heating the "Battleship" products of defendant, which included the primer he had, Ex. 14, and failed to inform the foreman.

3. Plaintiff's foreman, discovering the material was too thick to spread, called plaintiff and asked for instructions, and was told there was none.

In the words of Ray Rosenbaum:

> "Then on Tuesday night, which I believe was the 7th, I called him up after I had examined the barrels, and was wondering about the procedure

of putting it on. I believe that was the day before the fire. At that time I told him we were ready to put this primer on and that I had examined it and it was awfully thick, and asked him if he had any instructions or if it took any particular know how to put it on."
(R. 68).

And confirmed by Segerstrom in this way:

"On July 6th he again called me and said he had labor available to apply the roofing and asked if it was all right to go ahead. At that time he asked me for directions as to how to apply the primer.

"I told Mr. Rosenbaum there were no instructions on applying the primer and to go ahead and put it on."
(R. 61).

Rosenbaum was then asked the question:

"And if you had known the instructions told you to leave it in a warm place for 72 hours, you would have done that, wouldn't you?"

Answer: "Well, I presume I would."
(R. 77).

And again with respect to putting it over an open fire:

"If I had been given an instruction book which said 'do not heat or thin Battleship', I wouldn't have done that, as I usually obey orders."
(R. 80,81).

4. Left to his own initiative, plaintiff's superintendent improvised a crude and dangerous device designed to apply excessive heat to the primer as a means of restoring the fluidity, the loss of which plaintiff had brought about by his own act of cold storage.

5. If so risky and primitive a fire box as this was to be used, common prudence would have maintained it outside the building, not inside where fumes would congregate.

Amplifying these facts, the nature of the risks taken in building a fire directly under pails containing this primer is shown by the crudity of the contrivance used.

Large holes were cut in either end of a 50-gallon drum —one to take the applewood in, the other to let the smoke out. Then two holes were cut in the top side of the drum so that two buckets containing the primer would sit down *in* the drum directly over the fire.

True, the witness says that he let the applewood burn until it "was more or less coals"; but, at the noon hour, more applewood was fed into the drum with the inevitable result that the flame must have flared up against the bottom of the buckets. As one of plaintiff's chief expert witnesses, Kniseley said:

> "There is an awful lot of careless operation of tar-pots."
> (R. 150).

Such "careless" operation is, of course, intrinsic in a contrivance so primitive where there is no control whatever nor any way of measuring or regulating the amount of heat generated by the burning of applewood immediately under the buckets.

Furthermore, it is clear that plaintiff's employees on the job realized that they were taking risks in heating this primer directly over the fire. Rhea Rosenbaum, the

superintendent in charge, testified on his direct examination on behalf of plaintiff:

> "I told Mr. Woods to be a little bit careful and not spill a bucket, something to that effect, in handling the material while being heated on the stove, for the reason I presumed *it might burn* if it were spilled directly on the fire. I didn't know to what extent it might burn but I didn't figure it would amount to too much." (Emphasis supplied.) (R. 72).

Tom Woods, who looked after the fire built directly under this primer, testified to the warning given him by the plaintiff's superintendent, as follows:

> "Mr. Rosenbaum had told me to be careful and not let it get too hot."
> (R. 24).

And, on cross-examination, Rosenbaum further testified:

> "If I had been given an instruction book which said, 'Do not heat or thin Battleship', I wouldn't have done that, as I usually obey orders."
> (R. 80, 81).

This makes it clear that if the plaintiff had given his superintendent in charge the pamphlet which defendant had mailed to plaintiff, with the intent to warn him against heating it, the superintendent would not have disregarded the warning in the pamphlet, and the accident would never have occurred.

True, as plaintiff so vehemently and often insisted at the trial, the primer could be *applied* by unskilled labor. But, to say this is far from telling plaintiff that he can deprive the primer of its fluidity and then re-

store it by means of his own devising, in disregard of any inquiry or instruction.

So to bring together the facts out of plaintiff's own case is to establish the proximate cause of the fire. There is an excellent statement of the rule in 2 "Restatement of Torts," p. 1186, Sec. 441 (2b) which distinguishes between remote and proximate cause. It chiefly deals with the intervention of a third person but the rule so stated is equally applicable when the intervening force is set in motion by the plaintiff himself, or some agent of his.

> "The cases in which the effect of the operation of an intervening force may be important in determining whether the negligence actor is liable for another's harm are usually, although not exclusively, cases in which the actor's negligence has created a situation *harmless until something further occurs,* but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actor's negligence is often called passive negligence while the third person's negligence which sets the intervening force in active operation, is called active negligence." (Emphasis supplied.)

Where the delivery by the railroad of a container of inflammable spirits in a broken condition resulted in a heavy loss by fire of the contents of the entire carload, the Supreme Court of the State of Washington applied the above rule as follows:

> "Undoubtedly the carriage of the spirits from Minneapolis to its destination at Portland with one of its containers in a broken condition was an event in the sequence of events that led up to the loss of

> the property, but it was no more the proximate cause of the loss than was . . . any other act committed in reference to the property prior to its loss."
>
> *Rothchild Bros. v. N. P. Ry. Co.,*
> 68 Wash. 527, 532; 123 Pac. 1011.

A railroad violated a city ordinance by allowing its engine to stand in the street in excess of the time permitted by ordinance. The plaintiff walked out into the street around the front of the engine, after the ordinance had thus been violated, and was struck by a motor car, suffering serious injuries. Holding that the railroad company's negligence was not the proximate cause of the injuries sustained by plaintiff, the Supreme Court of Washington said:

> "Respondent's act of which appellant complains did no more than supply a condition by which the injury was made possible."
>
> *Smith v. G. N. R. Co.,*
> 14 Wash. 2d, 245; 127 P. 2d, 712.

See also to same effect:

United States v. Rothschild I. S. Co.,
183 F. 2d, 181 (Ninth Circuit).

Stephens v. Mutual Lumber Co.,
103 Wash. 1; 173 P. 1031.

Berry v. Farmers Exchg.,
156 W. 65, 17; 286 P. 46.

Johanson v. King Co.,
7 W. 2d, 111; 109 P. 2d, 307.

Cook v. Seidenverg,
36 W. 2d, 256; 217 P. 2d, 799.

We turn to a few illustrative cases from other states closely related to the case at bar, and in harmony with Washington decisions.

The act of a passenger who had boarded the wrong train through the actionable negligence of the carrier, in alighting while the train was in motion, without being advised to do so, was the act of a responsible agent intervening between the negligence of the carrier and the injuries sustained while alighting, which precluded the recovery thereupon. The court said:

> "The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded. In other words, the law always refers an injury to the proximate, not to the remote, cause. If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and will refuse to trace it to that which was more remote. To the proximate cause we may usually trace consequences with some degree of assurance, but beyond that we enter a field of conjecture where the uncertainty renders the attempt at exact conclusions futile."

Chesapeake & Ohio R. Co. v. Wills,
(Va.) 68 S. E. 395, 397.

In violation of statute, a steamer discharged a considerable quantity of fuel oil from its hold into the waters of the bay, and it flooded under the wharf and around the opposite side. By some independent means, a fire was started on the wharf which damages a vessel lying on the opposite side from the steamer, the in-

jury being increased by the burning oil which flooded around her sides and which caught fire from the burning wharf. It was held that the act of the steamer in discharging the oil into the bay was not the proximate cause of the injury but only created a condition which made the subsequent fire, which was the proximate cause, more disastrous and that she was not liable for such injury, or any part of it. This is a well-considered case and has numerous quotations from texts and other cases supporting its decision on the question af proximate cause.

The Santa Rita,
173 F. 413.

Plaintiff claimed injury from kerosene that did not comply with the requirements of the statute. Just how the accident happened was in doubt, but the court held that if the kerosene was poured on the live coals in the kitchen, the plaintiff could not recover. The court said:

> "The jury were also instructed that, if the oil exploded while the decedent was pouring it on the fire it was for them to say if such conduct was careless. As a matter of general understanding, there is danger of explosion in doing such a thing, and ordinary prudence does not countenance it. It is below the standard of care the average man takes, and can not fairly be called the exercise of due care. If the decedent was burned by an explosion under such conditions everyone in the exercise of fair judgment would call her in fault. The evidence of an expert that such an act might be done without producing an explosion does not tend to disprove the common knowledge that *it is not an act of safety.*" (Emphasis supplied.)

Olena v. Standard Oil Campany,
(N. H.) 135 Atlantic 27, 30.

In the instant case, it certainly was not an act of safety to take the chances that plaintiff did in heating up the primer within the confines of the building with the crude device used.

Applying these principles to the facts of this case, we enter into a field of uncertain conjecture when we go beyond the immediate facts of the plaintiff's own obvious carelessness to seek for a remoter cause of the fire. Was plaintiff warranted in putting aside the information given him in the "Battleship" circular? When plaintiff learned that the primer lacked its normal fluidity, from his own act or otherwise, was he in the exercise of due care when he failed to inquire or to inform himself as to a safe, certain method of restoring that fluidity? It is such conjectures as these that plaintiff invites when he asks the court to go beyond his immediate independent and manifest negligence to seek for a remoter cause of this fire.

As a corollary in this, the actual cause of the explosion and fire is in great doubt. By that we mean this;—plaintiff's witnesses based their theory entirely upon the basis that the samples which they took, commencing two months after the fire, from a drum which had been left standing unguarded and unprotected all that time, contained gasoline. "The gasoline was the whole story of the hazard." (McGivern R. 124). "The cause of the fire was the gasoline fumes." (Kniseley R. 141).

Yet there was no physical possibility of gasoline being in the primer when it was delivered to Segerstrom. The refinery has a better use for motor fuel which is

kept in an entirely separate part of a large plant one and one-half miles long. It is not a satisfactory cut-back in any event, and they use a solvent more suitable. After being given a complete test in the mixing still, it is pumped directly into a tank wagon, carried to the packaging plant at a temperature which admittedly would distill off any gasoline. It is then reheated, placed in packages, and remains in the custody of a common carrier or public warehouse until received by the defendant.

The barrels were then put into a refrigerated and insulated warehouse. (It is true that Mr. Rosenbaum says that he thinks that the refrigeration was turned off about that time.) Naturally, it was found difficult to pour when they attempted to use it in July and asked Segerstrom for instructions.

The casks from which the samples were taken remained on the loading platform during a terrific fire which destroyed a large warehouse. Gallons of water were poured upon it undoubtedly. What persons had access to it from that time on, we do not know. It was finally removed to an open shed a short distance away. Innumerable people were there looking at the barrel. Many possibilities occur to one, but, in the words of Mr. Urmacher, the chemist under whose control this product is manufactured, "Something happened to it after it left our plant." (R. 232).

These facts make all the more important the question of proximate cause which we have just discussed. It is possible, as a matter of fact, that the naphtha nor-

mally used in making this cut-back would have created a somewhat similar situation within the warehouse, as described by the witnesses as having been created by gasoline. However, their opinions were based on gasoline which could not possibly have been in the product before delivery to the plaintiff. The whole trouble was building a fire under a mixture of this sort. In fact, the plaintiff's own expert, Kniseley, put his finger on the matter when he said, "I found fault with the attempt to heat the primer by the workmen, but not with the procedure followed." (R. 149).

THE DEFENDANT'S PRIMER IS NOT WITHIN THE EXPLOSIVE STATUTE OF THE STATE.

SECTION 70.74.300 R.C.W.

Specifications of Error III, V.

The trial court laid in the lap of the jury a section of the Washington criminal code in these words:

> "You are instructed that there is a statute in the State of Washington, Revised Code of Washington 70.74.300, which provides as follows:
>
> 'A person who puts up for sale, or who delivers to a warehouseman, dock, depot, or common carrier, a package, cask, or can containing benzine, gasoline, naphtha, nitroglycerine, dynamite, powder, or other explosive, or combustible substance, without having printed thereon in a conspicuous place in large letters the word 'Explosive' shall be guilty of a misdemeanor.'
>
> "You are instructed that a violation of the foregoing statute would constitute negligence. Therefore, if you find from a preponderance of the evi-

dence that the primer which defendant Panther Oil & Grease Manufacturing Company sold to plaintiff was a material of such composition or character as would be embraced within the terms of the foregoing statute, then I instruct you that the defendant, in such event, would be guilty of negligence for failing to label the primer in the manner required by the statute."

To submit this statute to the uninstructed interpretation of the jury, without chart or guide, was error for several reasons: First, because the interpretation of the statute is for the court as a question of law, not for the jury;

Second, because this is a criminal statute, to be strictly construed, not to be extended beyond its plain terms;

Third, because under the rule of *ejusdem generis* a roof or paint primer or coating is manifestly not within the terms of this statute;

Fourth, because the statute has never been treated by the law enforcement officers of the state as applicable to roof or paint primers or coatings.

We treat of these four propositions in their order:

First: *Statutory Interpretation for the Court*: This instruction turned the jury loose to interpret the meaning of the foregoing statute as it might see fit. For example, without judicial interpretation the jury was at liberty to give to the words "combustible substance" the ordinary and dictionary meaning of any substance that will burn. Such a submission of the statute without

judicial guidance was in effect to tell the jury to find that the defendant had disregarded the statute and was therefore liable to the plaintiff.

But it is hornbook law that it is for the court, not for the jury, to interpret the meaning of statutes. In *Northern Pacific R. R. Co. v. Finch,* 225 Fed. 676 Judge Amidon succinctly expressed the vice of submitting a statute in the raw to a jury for it to place its own interpretation upon it, in these words:

> "It is for the court to say what Congress meant by this (statutory) language. That question cannot be properly left to the jury. Otherwise there would be as many rules as there are verdicts."

To same effect see:

Hill v. R. R. Co.,
(Minn.) 200 N. W. 485, 487.

Boston v. Boston el R. R. Co.,
(Mass.) 100 N. E. 601.

The Supreme Court of the State of Washington in *Hastings v. Department of Labor and Industries,* 24 Wash. 2d. 1, 12-13, 163 P. 2d. 142, reached a like conclusion, saying:

> "The question with which we are here immediately concerned is not so much *how* the act shall be construed, but, rather, *by whom* it is construed.
>
> "The judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of the government, and it is the court's province, as well as its duty, to construe laws enacted by the legislature, 50 Am. Jur. 198, Statutes, Sec. 219.

"By Rem. Rev. Stat., Sec. 89 (P. P. C. Sec. 72-1), a jury is defined as:

'A body of men temporarily selected from the qualified inhabitants of a particular district, and invested with power . . . to try a question of fact.'

"Expressed with relation to each other, the province of the court—the trial judge—is to determine and decide questions of law presented at the trial and to state the law to the jury, while the province of the jury is to determine the facts of the case from the evidence adduced, in accordance with the instructions given by the court. 53 Am. Jur. 141, Trial Sec. 156."

Second: *Rule of Strict Construction*: This statute was enacted as a part of the criminal code of the state, being Section 254 of the Session Laws of 1909, Chapter 249. As a penal statute it should be given a strict construction and not extended beyond its plain terms and intent. This basic rule needs no elaboration, but two characteristic utterances of our Supreme Court are directly applicable. In *State v. Eberhart,* 106 Wash. 222-225, 179 P. 853 in construing a penal statute our Supreme Court said:

"The rule for the construction of penal statutes is, that they are to reach no further than their words and a person is not to be made subject to them by implication."

And in *Huntworth v. Tanner,* 87 Wash. 670, 682, 152 P. 523 our Supreme Court said:

"The law is penal. It is well settled that if it is doubtful whether a given act falls within or without a penal statute, the doubt will be resolved in favor of the innocence of the one charged or who may be charged, with its violation.

> 'Laws are interpreted in favor of liberty, and if a statute is capable of two constructions, one of which makes a given act criminal and the other innocent, the statute will be given the construction which favors innocence.' *State v. Anderson,* 61 Wash. 674, 112 Pac. 931."

Third: *Ejusdem Generis*: An examination of the statute discloses how narrow are its specific terms. Of the four main products of petroleum it mentions three but omits the fourth, kerosene, which was equally as "combustible" as the three mentioned to-wit: benzine, gasoline and naphtha. Yet it will be remembered that in 1909 kerosene was the major product of petroleum.

In the article on petroleum in the 2nd Edition of Volume 18 of the New International Encyc. p. 440 (published in 1916) the text in referring to the distillation of petroleum in the year 1913 said:

> "In the distillation of 100 gallons of crude petroleum there are obtained on the average about 76 gallons of illuminating oil (kerosene) 11 gallons of gasoline, benzine and naphtha and three gallons of lubricating oil while the residuum and loss amount to ten gallons."

This clearly indicates how large was the consumption of kerosene proportionately and how tiny the use of gasoline as late as 1913.

Conversely in the article on petroleum in 15 Collier's Encyc., p. 618 we are told that in 1947 nearly 800,000,000 barrels of gasoline were consumed in internal combustion engines in the United States while only 104,000,000 barrels of kerosene were used, a striking reversal in consumption.

In 1908, the last full year before the adoption of the statute in question at the January-March session of the 1909 legislature which passed this law, the public records in the office of the Department of Licenses of the State of Washington discloses that there were only 1955 motor vehicles of all descriptions in the entire state of Washington and the same record discloses that the first motor car had been licensed for use in this state in 1906, only two years earlier. The same record discloses that in 1953 there were over 1,100,000 such vehicles licensed in this state.

In Volume 17 Encyc. Brit. (1954) at page 662 the text of its article on petroleum is:

> "Kerosene was the industry's principal product until the early 20th century, when the kerosene age gave way to the gasoline age. Up to this time gasoline had been virtually a waste product, a nuisance to refiners . . . the easiest way to dispose of gasoline was to let it run away down the creeks."

In other words, the use of petroleum products, except for kerosene, was only in its infancy in 1909. Their nature was not well understood, the volume of use of them was tiny and it seemed appropriate to the legislature to deal cavalierly with benzine, gasoline and naphtha. No wonder the trial judge spoke of this statute as obsolete. (R. 293). The reasons why it is obsolete are to be found in the sudden and astounding spread of the use of these petroleum products to the point that every adult is as familiar with the uses of petroleum products as he is of wood, also a combustible.

Now, this sleeping statute is suddenly awakened by ingenious counsel for plaintiff and sought to be used, not against the products named in the statute, but against a highly reputable, well understood commercial product, merely because appellees have employed a chemist who, by distillation and redistillation of this primer, has finally been able to extract from it a minor percentage of gasoline, just as he would have been able to do if he had distilled any of the many hundreds of other commercial products which modern chemists miraculously and bounteously produce out of hydro-carbons.

This statute is so primitive that it assumes that gasoline would continue to be sold in the familiar five-gallon cans in grocery stores. There was no prevision of the ubiquotous gas stations that now so prominently and numerously dot the landscape in all directions and which have completely done away with the gasoline can in marketing, thus abolishing the statute as effectively as to gasoline as if the legislature had repealed it.

The much greater predominance in 1909 of kerosene over gasoline, benzine and naphtha forbids the surmise that kerosene was overlooked by the legislature. On the contrary its omission clearly indicates how narrow was the expected scope of the statute and calls especially for the application of the familiar rule of *ejusdem generis,* in considering the meaning of the statutory words "or other explosives or combustible substance." If we do not apply the rule of *ejusdem generis* to the word "combustible" it leads to absurdity.

In Websters New International Dictionary the word "combustible" is defined as "capable of undergoing combustion; apt to catch fire; inflammable." Thus any substance made of the carbons or hydrocarbons, such as wood, coal, cotton or vegetable fiber and all of the new plastics, to name but a few, are combustible. To suppose that the legislature intended any and all articles thus derived to be labeled "explosive" would give us a preposterous result.

The rule of *ejusdem generis* is so widely applied and so well understood that we confine our citations to but a few of the cases deemed in point.

In *State v. Hemrich,* 93 Wash. 439, 447, 161 P. 79, the Supreme Court of Washington refused to follow the case of *People v. Strickler,* 25 California Appeal 60, 142 p. 1121 saying of it:

> "The decision is obviously unsound. It reverses the rule of *ejusdem generis* in order to make the general terms of the statutory definition control the particular terms. The correct application of that rule in statutory construction is just the converse.
>
> 'In statutory construction, the '*ejusdem generis* rule' is that where general words follow an enumeration of persons or things by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned.' "

In *State v. Eberhart,* 106 Wash. 222, 224-5, 179 P. 853, defendant was prosecuted for larceny of property owned by a partnership in which he was a partner. The

prosecutor claimed that the general clause in the statute, "or a person authorized by agreement," which followed the specific classes mentioned was broad enough to include the acts for which defendant was prosecuted.

Denying the contention of the state the court said:

> "This is a general clause following the specific mention of a number of enumerated subjects. In such a case, the rule is that the enumeration of a special class of subjects, being followed by a general clause intended to embrace subjects not enumerated, the general clause will be construed to include only subjects that partake of the same nature as those already mentioned (citing cases).

The last sentence of the above strongly denies the application of this "explosive" statute to such a subject as paint or roof primer.

In the late case of *State v. Thompson,* 38 Wash. 2d. 774, 777, 232 P. 2d. 87 in restricting the effect of a statute defining the crime of second degree burglary our Supreme Court gave yet another expression to the principle of *ejusdem generis* in the following words:

> "The *ejusdem generis* principle of statutory interpretation is well known and citation of available and extensive authority is not indicated. The principle requires that general terms appearing in a statute in connection with precise, specific terms, shall be accorded meaning and effect only to the extent that the general terms suggest items or things similar to those designated by the precise or specific terms. In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence or collocation in legislative enactments."

To same effect see:

Farwell v. Seattle,
43 Wash. 141, 146, 86 P. 217.

State ex rel Gilroy v. Superior Court,
37 Wash. 2d. 926, 932, 226 P. 2d. 882.

Inasmuch as the adoption of the rule of *ejusdem generis* by the Supreme Court of this state is based on the decisions of the courts of other states and is in accord with the general rule widely recognized by our courts, the following cases have been selected out of many more because of their special pertinence.

See:

Smith v. State,
(Okla.) 151 P. 2d 74, 85.

McGee v. Bennett,
(Ga.) 33 S. E. 2d. 577.

Zinn v. City,
(Mo.) 173 S. W. 2d. 398.

Fourth: *Executive Construction*: Volume 7 of the Annotations to R. C. W. and Shepard's Citations alike disclose that the above statute has never been referred to in any way by our Supreme Court, and the records of the office of the Attorney General of the state show that the Attorney General has never been called on to construe or give an opinion concerning the statute.

With reference to this court's taking judicial notice of the official records in the Attorney General's office, we rely on:

Chicago-M. and St. Paul R. R. Co. v. Hedges,
5 F. Supp. 752, 755.

Savannah River Elec. Co. v. F. P. C.,
164 F. 2d. 408.

Hernandez v. Frohmiller,
(Ariz.) 204 P. 2d. 854.

Furthermore the industry of appellee's counsel was unable to discover a single can of roof coating, primer, paint or similar product that had ever been labeled in compliance with this statute. The most they were able to show was that certain competitive roof coating stamped their cans with "Do not heat" which manifestly does not make any effort to comply with the statute.

When counsel for appellant expressed their surprise and dismay at the giving of such an instruction the trial judge, in ruling thereon said:

> " * * * it seems peculiar to me that the statute hasn't been enforced, that it should be applicable in a case of this kind, but, of course, it is neither my duty or my function or in my power to try to wipe from the statute books of the State what I regard as perhaps *obsolete* statutes that should be repealed." (R. 293). (Emphasis supplied).

The importance of the error in giving this instruction is disclosed by another comment made by the learned trial judge in ruling on the motion for a new trial where he said:

> "I have the definite impression that, to say the least, it is extremely doubtful to me in my mind, that the plaintiff would have recovered at all in this case if it hadn't been for the statute which was submitted to the jury." (R. 326).

Fourth: The above history of this statute indicating that neither the office of the Attorney General nor any of the 39 County Prosecutors, charged with the enforcement of the statute, over a period of 45 years, have ever considered that this statute went beyond its plain terms to cover such commercial products as roof or paint primers or coatings, gives rise to the application of another generally recognized legal principle of respect by the courts for executive construction. That rule was adopted early in the history of the decisions of our Supreme Court. In *Regan v. School District No.* 25, 44 Wash. 523, 525, 87 P. 828, the Supreme Court of Washington said:

> "While the construction placed upon a statute by a department of the government having to do with the subject-matter thereof is not conclusive upon the court, yet such interpretation (and especially when long observed) will not be ignored or lightly regarded." (Citing cases).

The ruling there laid down has been reaffirmed by our Supreme Court in a number of cases:

Spokane & Eastern Trust Co. v. Young,
19 Wash. 122, 124, 52 P. 1010.

State ex rel Shively,
63 Wash. 103, 107, 114 P. 901.

State ex rel Ball v. Rathbun,
144, Wash. 56, 59, 256 P. 330.

State ex rel Taylor v. Superior Court,
2 Wash. 2d. 575, 586 P. 2d. 585.

Smith v. Northern Pacific R. Co.,
7 Wash. 2d. 652, 664, 110 P. 2d. 851.

In view of the fact that this rule has been taken from the decisions of many other states as indicated in the Regan case and in view of its special importance here we venture to extend this text by quotation from decisions of other states and the Federal courts.

In *United States v. Cooper Corp.,* 312 U. S. 600, 613 where there was a suit to recover triple damages by the United States under a statute awarding triple damages to any "person" damaged, the fact that no suit had ever been brought by the United States in the 50 years of the life of the statute was held significant in demonstrating that "person" did not include the United States.

In *Kithcart v. Metropolitan Life Insurance Company,* 55 Fed. Supp. 200 (certiorari denied 326 U. S. 777).

> "The concurrence of the bar in any interpretation of the Constitution and laws for a long period of time is the strongest sort of argument that such interpretation is right."

(Quoted approvingly in *Jackson v. Missouri R. Co.* in 211 S. W. 2d. 931-937. (Mo.).

In *Westerman v. Supreme Lodge the Knights of Pythias,* 94 S. W. (Mo.) 470, the Supreme Court of Missouri quoted approvingly from Endlich on the Interpretation of Statutes, Sec. 83 as follows:

> "A statute applicable to a large trade or business should, if possible, be construed, not according to the strictest or nicest interpretation of the language but according to a reasonable and busi-

ness interpretation of it, with regard to the trade or business with which it is dealing."

See also:

Matthews v. Matthews,
(Okla.) 96 P. 2d. 1054, 139, ALR 202, 204.

State v. Iowa Agric. Assn.,
(Iowa), 48 N. W. 2d. 281.

State v. Coloff,
(Mont.) 231 P. 2d. 345.

Denver v. School District,
(Col.) 30 P. 2d. 866.

State ex rel Butz v. Marian Circuit Court,
(Ind.) 72 N. E. 2d. 225, 170 ALR 187, 196.

State v. Nashville Baseball Assn.,
(Tenn.) 211 S. W. 357.

Summarizing; over the vigorous protests of defendant's counsel (R. 293-296) the trial judge submitted to the jury, for its own interpretation, without explanation or definition of any kind, an obsolete criminal statute, respecting the petroleum products of benzine, gasoline and naphtha or other "combustible substance," and gave to the jury *carte blanche* to enforce that statute against the widely used commercial roof primer of appellant, in spite of the fact that the State of Washington in more than 45 years had never once given any such interpretation to this statute. A more flagrant violation of the rights of this defendant can hardly be imagined.

CONCLUSION

Clearly the plaintiff made no case as against the defendant under the circumstances related, because, (1) there was no primary negligence, or (2) if there were primary negligence the proximate cause of plaintiff's damages were his own gross carelessness in failing to advise his men, and in their, without guidance or direction, engaging in a cooking operation which they knew would be dangerous.

If the court can not agree with us in these, then the very prejudicial error in permitting the jury to classify this roof primer, along with gasoline, benzine, naphthas and dynamite, entitles the defendant to a new trial on the question of liability. There is no cross appeal.

Respectfully submitted,

R. E. LOWE
BEN H. KIZER,

Attorneys for Appellant.

GRAVES, KIZER & GRAVES
PAINE, LOWE, COFFIN, ENNIS & HERMAN

CAREFULLY follow these instructions for applying BATTLESHIP

...and LONG-LASTING WATERPROOF PROTECTION is yours!

Special Notice

BATTLESHIP LIQUID ASBESTOS ROOF COATING IS NOT RECOMMENDED FOR USE ON WOOD SHINGLES OR SLATE ROOFS.

Please... READ THIS PAGE before starting application!

DO NOT HEAT OR THIN BATTLESHIP

Do not heat BATTLESHIP with an open flame. Do not thin it. When either is done, the waterproofing qualities of BATTLESHIP are damaged. Hence, a proper job is impossible. If, in extremely cold weather, it is necessary to heat BATTLESHIP, do so by placing the drum in a warm room 72 hours before the material is to be used.

Throughout this booklet, PANTHER PATCHING MATERIAL and BATTLESHIP PLASTIC CEMENT are mentioned in conjunction with BATTLESHIP LIQUID ASBESTOS ROOF COATING. If you do not have one of these materials, you may make various substitutions. Where, PANTHER PATCHING MATERIAL is mentioned, you may substitute with tin, canvas, burlap, muslin or roofing paper. BATTLESHIP LIQUID ASBESTOS ROOF COATING may be substituted where BATTLESHIP PLASTIC CEMENT is mentioned.

INDEX

FOR APPLYING BATTLESHIP TO: